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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 569

THE NEW MEXICO STATE GAME COMMISSION, *Petitioner*

v.

WALTER J. HICKEL, Secretary of the Interior, ET AL., *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICUS CURIAE

The International Association of Game, Fish and Conservation Commissioners (hereafter "the Association"), amicus curiae, urges that the petition prayed by the New Mexico State Game Commission for a writ of certiorari to review the decision of the U. S. Court of Appeals for the Tenth Circuit in this case be granted.

INTEREST OF AMICUS CURIAE

The Association is a voluntary, unincorporated association, dedicated to coordinating the efforts of public administrative agencies responsible for the protection, preservation, and management of the game, furbearers, fish, birds, forests, waters, and soils of North America. Founded at Yellowstone National Park in 1902, the Association numbers as government members the fish and game departments of all fifty States and of seven Canadian provinces. The National Park Service administers areas in many states, with a total acreage in excess of 29 million acres. Total federal ownership of land is much more extensive, amounting to approximately 33 per cent of the total acreage of the fifty States and the District of Columbia. In the public land states of the West, sizable areas are in federal ownership as indicated by the percentages of total acreage of the listed States: Alaska (97%), Nevada (86%), Utah (67%), Idaho (64%), Oregon (52%), Wyoming (47%), Arizona (45%), California (44%), Colorado (36%), New Mexico (34%), Montana (30%), and Washington (29%).[1] Federally owned lands often furnish superior game habitat, and revenues to the States mentioned above from sale of hunting and fishing licenses amounted to approximately $45 million dollars in fiscal year 1967.[2] It is believed that well over half of this hunting and fishing effort occurred

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[1] Inventory Report on Real Property Owned by the United States Throughout the World, as of June 30, 1967, General Services Administration, Washington, D. C., Table 4, p. 46.

[2] Number of Paid Hunting and Fishing License Holders, License Sales and Cost to Hunters and Fishermen, Fiscal Year 1967, Bureau of Sports Fisheries and Wildlife, U.S. Department of the Interior, Washington, D. C.

on lands owned by the federal government. Due to the magnitude of the federal holdings, it is of prime importance to amicus curiae that the limits of federal authority over wildlife be maintained.

STATEMENT OF THE CASE

In October 1967 the Superintendent of Carlsbad Caverns National Park, a national park owned by the United States of America and located in Eddy County, New Mexico, advised the New Mexico Department of Game and Fish that a research project would be undertaken by federal officers on the park. The Department was further notified that as part of the research project, entitled "Deer-Range Ecology Study," deer paunches would be collected and examined, and up to fifty deer would be killed on park lands for this purpose. In answer to this notification, the state game and fish agency noted that such a study would be of value but that prior to any deer collection it would be necessary that collecting permits be issued to cover such activity. The agency's letter further stated: "If you will furnish us a list of the personnel whom you plan to assign the collection of these deer, we will be happy to issue the necessary permits and to make arrangements with our District Conservation Officer Leonard Gonce for the legal disposition of the carcasses." Prior to October 1967 the National Park Service had on numerous occasions requested and obtained from the New Mexico Department of Game and Fish scientific collectors' permits under appropriate state law authorizing Park Service personnel to take, capture and kill on the park designated species of protected wildlife. In reply, the Park Superintendent stated, "Inasmuch as this is a Federal project carried

out on Federal lands, we do not consider it necessary that our men have collecting permits issued by your Department."

After several deer had been killed by federal officers, the New Mexico State Game Commission filed its complaint in the United States District Court for the District of New Mexico seeking declaratory and injunctive relief against the Secretary of the Interior and other departmental officials and personnel. Plaintiff alleged that pursuant to the law of New Mexico the State Game Commission is charged with the responsibility of managing, controlling and regulating the hunting of all resident species of wildlife within the State, and argued that defendants' actions were in excess of statutory authority, but that if found to be within statutory authority, such statute would be unconstitutional.

The District Court sustained New Mexico's claim that the killing of deer for the purpose of conducting a scientific research study was not within the authority bestowed by Congress in the National Park Service Act of 1916, 16 U.S.C. § 1 et seq. (1964). Specifically, the District Court held that the killing of deer was not authorized by 16 U.S.C. § 3 (1964), which authorizes that the Secretary of the Interior may "provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks." This section was held inapplicable since "No showing has been made that the deer involved are detrimental to the use of the park, and indeed, defendants make no such claim." *New Mexico State Game Comm'n* v. *Udall, et al.*, 281 F.Supp. 627, 631 (D. New Mex. 1968). Defendants were thus enjoined from the further killing of wildlife within the

boundaries of Carlsbad Caverns National Park for the purpose of conducting a research study without first securing authority for their acts by compliance with State law.

On appeal to the United States Court of Appeals for the Tenth Circuit, that Court reversed, holding that the authority to destroy such animals as may be detrimental to the use of the park allows the Secretary to "use reasonable methods to obtain the desired information to the end that damage to the park lands and the wildlife thereon may be averted." *New Mexico State Game Comm'n* v. *Udall, et al.*, 410 F.2d 1197, 1201 (10th Cir. 1969).

REASONS FOR GRANTING THE WRIT

I. The National Park Service Act as Construed by the Court Below Is in Excess of the Power of Congress Under Article IV, Section 3, Clause 2 of the U. S. Constitution and Thereby an Intrusion Upon State Legislative Authority

The question here presented is whether federal officers on a national park may destroy protected species of resident wildlife in violation of state law not for the reason that such action is necessary to protect park lands from injury but on the ground that scientific information obtained could be useful at some future time in averting injury to park land. The court below found sanction for such conduct in a statute authorizing the Secretary of the Interior "to provide in his discretion for destruction of such wildlife as may be detrimental to the use of the park." 16 U.S.C. § 3 (1964). In response to the contention that the statute so construed would be in excess of congressional power, the court below simply declared, "Nor are there any constitutional barriers to the pro-

cedure," citing *Hunt* v. *United States,* 278 U.S. 96 (1928). *New Mexico State Game Comm'n* v. *Udall, et al.,* 410 F.2d at 1201.[3]

Numerous decisions of federal and state courts establish the proposition that the States possess authority

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[3] In so ruling, the court below went far beyond the holding of this Court in *Hunt* v. *United States,* 278 U.S. 96 (1928), where reduction of overabundant deer "was necessary to protect the lands of the United States within the reserves from serious injury [as] is made clear by the evidence." 278 U.S. at 100. In adopting an expansive interpretation of 16 U.S.C. § 3 (1964), the court below also rejected several rules of statutory construction indicating more limited scope to the statute. First, that a statute be interpreted, if fairly possible, so as to free it from not insubstantial constitutional doubt. *Lynch* v. *Overholser,* 369 U.S. 705, 711 (1962); *International Ass'n of Machinists* v. *Street,* 367 U.S. 740 (1961). Second, that solicitude for state interests requires showing of a clear and manifest purpose on the part of Congress to justify intrusion into the domain of state power and that justification for such an exercise of federal authority must be clearly present. *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 146-47 (1963); *Florida* v. *United States,* 282 U.S. 194, 211-12 (1931). Third, absent indication to the contrary, it may be presumed that Congress was aware of decisions recognizing state ownership of game as well as decisions under the Property Clause of the U.S. Constitution, Art. IV, § 3, cl. 2, dealing with power to protect lands of the United States and therefore that Congress acted with such decisions in mind. See *Lynch* v. *Overholser,* 369 U.S. 705, 710-11 (1962); *Shapiro* v. *United States,* 335 U.S. 1, 16 (1948). Finally, in interpreting 16 U.S.C. § 3 (1964), the court below did not see fit to discuss in its opinion relevant legislative history; concern in Congress over interference by the federal government with game subject to state regulation which served as a backdrop to the National Park Service Act of 1916; and contemporaneous expressions of opinion by the National Park Service in 1917 having to do with the extent of authority under 16 U.S.C. §3 (1964). Nor did the court below see fit to discuss the administrative practice of Park Service officials prior to October 1967 in seeking state permits before collecting protected species on the park. All of these factors and aids to interpretation point away from the construction adopted by the court below.

to regulate and control the taking of resident species of wildlife within their borders. E.g., *Lacoste* v. *Department of Conservation,* 263 U.S. 545 (1924); *Geer* v. *Connecticut,* 161 U.S. 519 (1896); *McCready* v. *Virginia,* 94 U.S. 391 (1877); *Hyde* v. *State,* 155 Ala. 133, 46 So. 489 (1908); *Begay* v. *Sawtelle,* 53 Ariz. 304, 88 P.2d 999 (1939); *Hornbeke* v. *White,* 20 Colo. App. 13, 76 Pac. 926 (1904); *Harper* v. *Galloway,* 58 Fla. 255, 51 So. 226 (1910); *Magner* v. *People,* 97 Ill. 320 (1881); *State* v. *McCullagh,* 96 Kan. 786, 153 Pac. 557 (1915); *State* v. *Sawyer,* 113 Me. 458, 94 Atl. 886 (1915); *People* v. *Zimberg,* 321 Mich. 655, 33 N.W. 2d 104 (1948); *State* v. *State Fish & Game Comm'n,* 437 P.2d 373 (Mont. 1968); *Allen* v. *McClellan,* 75 N.M. 400, 405 P.2d 405 (1965); *Judd* v. *Bernard,* 49 Wash. 2d 699, 304 P.2d 1046 (1956). State authority, as indicated in *Geer* v. *Connecticut, supra,* stems from the fact that authority is lodged in the state as a result of the common ownership of game by all the people of the state, which power is to be exercised as a trust for the benefit of the people. 161 U.S. at 529.[4] Nor is the right to regulate resident species of fish and game affected by ownership of land upon which wildlife may be found. *E.g., Hamilton* v. *Williams,* 145 Fla. 697, 200 So. 80 (1941); *Cummings* v. *People,* 211 Ill. 392, 71 N.E. 1031 (1904); *Allen* v. *McClellan, supra.*

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[4] In addition to authority deriving from ownership, state authority may also be upheld as an exercise of police power. Thus, as stated in *Geer,* "Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end . . . ." 161 U.S. at 534.

It is equally well settled that the federal government may acquire lands necessary or convenient for the exercise of its powers within a state. Absent state consent or a cession of jurisdiction, exclusive jurisdiction does not accrue to the federal landowner. "It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 650 (1930). See 36 Ops. Att'y Gen'l 527, 530 (1932).

In many national parks exclusive jurisdiction resides in the United States pursuant to cession by state legislatures. E.g., 16 U.S.C. § 24 (1964) (Yellowstone National Park); 16 U.S.C. § 95 (1964) (Mount Rainier National Park); 16 U.S.C. § 117 (1964) (Mesa Verde National Park). The State of New Mexico has made no cession of jurisdiction with respect to Carlsbad Caverns National Park. As a result, the United States does not possess exclusive jurisdiction over the Park, and the right to regulate wildlife resides in the State of New Mexico as an attribute of sovereignty subject only to a valid exercise of authority under the Constitution. Thus, for example, the federal treaty power prevails over the state interest, *Missouri* v. *Holland*, 252 U.S. 416 (1920), and notwithstanding state game laws the federal government may undertake reasonable steps to protect its lands from serious injury. *Hunt* v. *United States*, 278 U.S. 96 (1928). The question

here is whether federal officers may destroy deer in violation of state law in order, as the Park Service affidavit states, "that reliable scientific information may be gathered and used as a basis for other decisions affecting the management and administration of the area for the purpose of preserving and protecting the park lands from injury or damage." Amicus submits that such action intrudes upon the legislative authority of the State of New Mexico, *Colorado* v. *Toll,* 268 U.S. 228 (1925), and that, construed to authorize destruction for such purpose, 16 U.S.C. § 3 (1964) is in excess of congressional power under the Property Clause of the U. S. Constitution, Art. IV, § 3, cl. 2.

This Court has on several occasions discussed the scope of the Property Clause, the decisions indicating that the power therein granted is of a protective nature and not one designed to intrude upon state authority. In *Utah Power & Light Co.* v. *United States,* 243 U.S. 389, 405 (1917), the power with respect to lands owned by the United States was described as "the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power." In *Camfield* v. *United States,* 167 U.S. 518 (1897), this Court stated that the power encompassed the rights of an ordinary proprietor as well as a power analogous to the police power of the several states. However, the Court declared that such power was not without limits:

> While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within

> a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, *so long as such power is directed solely to its own protection.* 167 U.S. at 525-26 (Emphasis added.)

The limits of power under the Property Clause were further delineated in *Kansas* v. *Colorado,* 206 U.S. 46 (1907), an original bill in the Supreme Court to enjoin diversions of the Arkansas River. The United States intervened for the purpose of asserting a superior authority with respect to the flow of the Arkansas. Rejecting such claims except with respect to preservation or improvement of navigability, the Supreme Court discussed the Property Clause in the following:

> The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words "territory or other property." It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. *But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.* 206 U.S. at 89. (Emphasis added.)

Amicus submits that, as construed by the court below, 16 U.S.C. § 3 is in excess of congressional power

under the Property Clause. Where exclusive jurisdiction over an area does not reside in the United States, state game laws and regulations are applicable, and Congress may not by the establishment of a national park restrict the jurisdiction of a state over wildlife. If Congress chooses, it may of course restrict or prohibit hunting and fishing on federal lands, and no quarrel could exist were 16 U.S.C. § 3 construed to authorize destruction of wildlife, state law to the contrary notwithstanding, where such action is reasonably necessary to protect federal land from serious injury. But the concept approved by the court below, that state law may be overriden on the ground that destruction of wildlife would be useful as opposed to being necessary, is so potentially disruptive of federal-state relations that the concept should be rooted out by this Court.

II. The Decision Below Undermines the Concept of State Ownership of Resident Species of Wildlife

As stated in *Geer* v. *Connecticut, supra,* "The wild game within a state belongs to the people in their collective sovereign capacity." 161 U.S. at 529. It is manifestly clear, as set forth in *Geer,* that before the federal government was created the States possessed sovereign power with respect to fish and game within their borders, which power was not ceded to the national government. At the same time it is likewise settled that state authority over wildlife must be exercised within the confines of applicable constitutional limitations. As indicated above, state law yields where in conflict with a treaty made under the authority of the United States, and a state may not discriminate without reason against citizens of other states in violation of the Privileges and Immunities Clause. *Toomer* v. *Witsell,* 334 U.S. 385 (1948).

Attorneys for respondent apparently read this Court's decision in *Toomer* v. *Witsell, supra*, as applying the coup de grâce to the doctrine of state ownership of wildlife for the benefit of its people. In a report to the Public Land Law Review Commission, a commission created by Public Law 88-606 to undertake a comprehensive study of the public land laws, the Department of Justice recently stated: "The important point to remember when reading cases such as *Geer* is that, without exception, they have involved disputes between a state and an individual. In no case decided by the Supreme Court has the State power been successfully asserted over the Federal Government. Subsequent Supreme Court decisions have made it quite clear that, state contentions as to ownership of wildlife notwithstanding, the true basis of state authority rests on their police power." Letter of Acting Ass't Att'y Gen'l Taylor dated April 7, 1969, to Hon. Wayne N. Aspinall, Chairman, Public Land Law Review Commission, p. 5. Elsewhere in the same report, the Department of Justice declares the law to be that "The Federal Government, as manager of its own lands and property, may make different regulations [regarding resident wildlife] if Congress chooses, as appropriate to accomplishment of the purposes to which those lands are devoted." Id., p. 9.

Amicus submits that this Court has not interred the doctrine of state ownership, and such notion should be dispelled. In *Toomer* v. *Witsell, supra*, Chief Justice Vinson indeed described the ownership theory as a "fiction" but "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." 334 U.S. at 402. And, in a con-

curring opinion, Justice Frankfurter for himself and Justice Jackson emphasized the need to read the Privileges and Immunities Clause in conjunction with the Tenth Amendment which "presupposes the continued retention by the State of powers that historically belonged to the States and [which] were not explicitly given to the central government or withdrawn from the States." 334 U.S. at 408. Referring to the Privileges and Immunities Clause, Justice Frankfurter stated:

> This Clause does not touch the right of a State to conserve or utilize its resources on behalf of its own citizens, provided it uses these resources within the State and does not attempt a control of the resources as part of a regulation of commerce between the States. A State may care for its own in utilizing the bounties of nature within her borders because it has technical ownership of such bounties or, when ownership is in no one, because the State may for the common good exercise all the authority that technical ownership ordinarily confers. 334 U.S. at 408 (concurring opinion).

Amicus submits the Property Clause must be read in conjunction with the Tenth Amendment which presupposes State ownership of wildlife for the common good. The court below recognized state ownership of wildlife but apparently determined that it had no bearing on the extent of the authority with which the Secretary could be clothed in the instant case. It is submitted that the limits of power under the Property Clause are exceeded where federal officers are authorized to destroy wildlife in violation of state law where not reasonably necessary to protect federal lands from injury.

The decision below and the extravagant view of federal authority entertained by attorneys for respondent

can only result in continued jurisdictional disputes over wildlife protected by state law. The issue is of such importance that further disputes should be forestalled by this Court.

CONCLUSION

For the foregoing reasons and for those set forth in the Petition of the New Mexico State Game Commission, amicus-curiae urges that the Commission's Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was today served upon the parties to this proceeding by causing a copy thereof to be mailed via first-class mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, and by causing a copy thereof to be mailed via air mail, postage prepaid, to George T. Harris, Jr., Special Assistant Attorney General for the State of New Mexico, Public Service Building, P. O. Box 2168, Albuquerque, New Maxico 87103.

MARTIN L. FRIEDMAN

Dated: September 19, 1969.